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No. 95-584

In The

Supreme Court of the United States

October Term, 1995

TAREK ELAGAMY,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

LAWRENCE B. FABACHER, II
GILL & FABACHER
833 Baronne Street
New Orleans, LA 70113
(504) 522-2800

Attorney For Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

33 pp

QUESTION PRESENTED

The Attorney General, in her discretion, is authorized to grant suspension of deportation to an alien if the Attorney General determines that the alien is deportable under paragraphs (2), (3), or (4) of § 241(a); has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. 8 U.S.C. § 1254(a)(2).

The question presented is:

(1) Whether the ruling of the Board of Immigration Appeals in the present case declaring the Petitioner was statutorily ineligible to reopen the proceedings in order to apply for suspension of deportation was an abuse of discretion?

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No. _____

In The

Supreme Court of the United States

October Term, 1995

TAREK ELAGAMY,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

MAY IT PLEASE THE COURT,

Petitioner, Tarek Elagamy, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on August 22, 1995.

OPINIONS AND JUDGMENTS BELOW

The opinion and judgment of the three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered August 22, 1995, are reprinted in the Appendix to the Writ at pages App. 1 through App. 3. The decision and order of the Board of Immigration Appeals, dated February 9, 1995, are reprinted in the Appendix to this Writ at pages App. 4 through App. 7. The order and decision of the Immigration Judge, dated April 20, 1988 are reprinted in the Appendix to this Writ at pages App. 8 through App 14.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 22, 1995, affirming the Board of Immigration Appeals' decision dated February 9, 1995. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(a) and Sup. Ct. R. 20.1.

STATUTES AND REGULATIONS INVOLVED

This case involves the following provisions of the United States Code:

Title 8 U.S.C. § 1254(a)(2)[1]

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 241(a)(4)(D)) who applies to the Attorney General for suspension of deportation and – . . . (2) is deportable under paragraph (2), (3) or (4) of section 241(a); has been physically present in the United States for a continuous period of not less than ten years immediately following the *commission of the act*, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, o child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. (emphasis added).

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction in the Court of First Instance

Tarek Elagamy herein seeks review of the decision by the United States Court of Appeals for the Fifth Circuit

[1] Referred to throughout this Writ as Section 244(a)(2) of the Immigration and Nationality Act.

on their petition for Review taken from the administrative decision by the Board of Immigration Appeals (hereinafter "BIA") in deportation proceedings. The Fifth Circuit's jurisdiction was invoked under 8 U.S.C. § 1105a(a), which establishes the exclusive procedure for judicial review of such administrative decisions.

II. Statement of the Facts

Petitioner, Tarek Elagamy, is a thirty-seven-year-old native and citizen of Egypt. He has lived in the United States since May 15, 1982 when he was admitted at New York, New York as a legal nonimmigrant student and authorized to remain until December 31, 1985.

Mr. Elagamy testified before the Immigration Judge that he was born in Cairo, Egypt and was a Muslim, but that his present wife and stepchild were Christians. Mr. Elagamy testified to the hardship his wife would experience if she were to accompany him to Egypt since Christians are not well-liked and that his family would very likely reject her. Mr. Elagamy also testified that his wife would not be able to find employment because she could not speak Arabic. Further, Mr. Elagamy testified that he could become the target for persecution by Muslim fanatics, and even the government of Egypt, if his marriage to a Christian was reported.

He also testified to the furor and hatred pro-Iranian fanatical groups have directed toward Egyptians with ties to Americans, particularly the late President Anwar Sadat, who was assassinated in 1981.

Mr. Elagamy is presently the owner of Quality Complete Auto Center, Inc., a very successful automobile mechanic business in New Iberia, Louisiana. Mr. Elagamy employs nine United States citizens. Mr. Elagamy also owns real property in Lafayette, Louisiana, valued at approximately $250,000.00.

III. Course of Proceedings and Disposition in the Court Below.

On September 19, 1983, petitioner's status was adjusted to that of lawful permanent resident based on his marriage to a United States citizen. On September 10, 1986, Mr. Elagamy was convicted in the United States district court for the Eastern District of Louisiana under 18 U.S.C. § 1546, which pertains to fraud based on the misuse of visas, permits, and other documents for having falsely stated on his application for permanent residence status that he was living together with his ex-wife at the time of the application. The INS never sought to rescind Mr. Elagamy's lawful permanent residence status based on marriage fraud under INA § 246, nor was a criminal marriage fraud charge brought under INA § 375(b). Mr. Elagamy was sentenced to five years. Execution of the sentence was suspended and he was placed on five years active probation.

On December 17, 1986 an Order to Show cause was issued charging Mr. Elagamy with deportability pursuant to INA § 241(a)(5).[2] Mr. Elagamy was found deportable as

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[2] INA § 241(a)(5) under which Mr. Elagamy was charged has now been redesignated as INA § 241(a)(3)(B)(iii). This

charged and applied for relief pursuant to political asylum and withholding of deportation. A hearing on the Petitioner's applications for political asylum and withholding of deportation was held on April 20, 1988. At the conclusion of the hearing the Immigration Judge denied the Petitioner's applications for relief. Mr. Elagamy reserved his right to appeal.

On April 29, 1988 Mr. Elagamy appealed the Immigration Judge's denial of his applications for political asylum and withholding of deportation to the BIA. On June 24, 1992, the BIA denied his appeal. Mr. Elagamy then proceeded with a Pro Se appeal to the United States Court of Appeals for the Fifth Circuit. On March 29, 1993, Mr. Elagamy's Fifth Circuit Petition for Review was also dismissed.

On August 10, 1993, Mr. Elagamy, through undersigned counsel, filed a Motion to Reopen with the BIA seeking to have his proceedings reopened and remanded to the Immigration Judge to allow the Petitioner the opportunity to apply for suspension of deportation pursuant to § 244(a)(2) of the INA. The Immigration and Naturalization Service (hereinafter "INS") opposed the Motion to Reopen. On February 9, 1995 the BIA denied Mr. Elagamy's Motion to Reopen. Mr. Elagamy then filed a Petition to Review with the United States Court of Appeals for the Fifth Circuit on March 1, 1995. On August 22, 1995 the Order and Opinion of the Fifth Circuit was

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statute, as it existed at the time Mr. Elagamy was charged, could be invoked with any conviction under 18 U.S.C. § 1546, regardless of the underlying nature of the offense.

entered denying the Petitioner's appeal. Pursuant to Federal Rule of Appellate Procedure 41 the Fifth Circuit's mandate is scheduled to issue 53 days from the date that the Petition was denied.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. THE BOARD OF IMMIGRATION APPEALS ERRED IN DENYING THE PETITIONER'S MOTION TO REOPEN THE PROCEEDINGS TO APPLY FOR SUSPENSION OF DEPORTATION PURSUANT TO § 244(a)(2) OF THE IMMIGRATION AND NATIONALITY ACT BECAUSE HE HAD NOT BEEN IN THE UNITED STATES FOR TEN YEARS SINCE THE DATE OF HIS CONVICTION OF THE DEPORTATION-WORTHY CRIME. THE CORRECT INTERPRETATION OF INA § 244(A)(2) REQUIRES THE CALCULATION OF THE TEN-YEAR PERIOD TO BEGIN AT THE DATE OF THE COMMISSION OF THE ACT, NOT THE CONVICTION OF THE DEPORTATION-WORTHY CRIME.

In dismissing Petitioner's petition, the Court of Appeal relied on *Brown v. I.N.S.*, 856 F.2d 728, 731 (5th Cir. 1988), as precedent for interpretation of INA § 244(a)(2).[3] A closer review of Brown will reveal that it lends very little precedential value to the issue of when the ten-year period should begin for the purpose of § 244(a)(2) suspension of deportation. *Brown v. I.N.S.* was

[3] The *Brown* Court stated: " . . . Brown is ineligible for suspension of deportation pursuant to Section 244(a)(2) because he has not been in the United States for ten years since the conviction." *Id.*

decided on the issue of a discretionary relief from deportation pursuant to INA Section 212(c), and only peripherally addressed the issue of INA § 244(a)(2) suspension of deportation in a brief sentence.

The Fifth Circuit dismissed the Petitioner's petition in spite of the numerous decisions, both in the Fifth Circuit and in other circuits, which correctly recognize that the ten-year period should be calculated from the date of the commission of the deportation-worthy crime. In *Rodriguez v. I.N.S.*, 9 F.3d 408, 414 (5th Cir. 1993), the Court recognized the importance of the date of the underlying offense behind the conviction when deciding the issue of eligibility of § 244(a)(2) relief.[4] *See also United States v. Dist. Director of Immigration*, 634 F.2d 964, 978 (5th Cir. 1981); *United States v. Santelises*, 509 F.2d 703, 704 (2d Cir. 1975); *Reid v. I.N.S.*, 756 F.2d 7, 8 n.5 (3d Cir. 1985); *Borokkini v. U.S. I.N.S.*, 974 F.2d 442, 445 (4th Cir. 1992); *Cortes-Castillo v. I.N.S.*, 997 F.2d 1199, 1203 n.2 (7th Cir. 1993); *Rassano v. Immigration and Naturalization Service*, 492 F.2d 220, 223 (7th Cir. 1974).

In *Leon-Hernandez v. U.S. I.N.S.*, 926 F.2d 902, 905 (9th Cir. 1991), the Court explicitly stated the Attorney General may suspend deportation per § 244(a)(2) if the alien "has been physically present in the United States *for a continuous period of not less than ten years immediately following the commission of the act . . . constituting a ground for deportation . . .*). *Id.* (emphasis theirs). The Ninth Circuit

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[4] "Because Rodriguez's convictions which were the basis for his deportation order occurred in 1988 (*and the underlying offenses in 1987*), he has not met this time requirement." *Id.* n.14. (emphasis added).

expressly disregarded the "or assumption of status" clause of § 244(a)(2) when deciding whether that alien was eligible for relief. The Court preferred the better interpretation of the statute, which mandates the ten years to begin with the commission of the deportation-worthy crime.[5]

Further, in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), the BIA held that where deportability is based on criminal grounds, the ten-year period is measured from the date of the conviction, not the date the offense was committed, since it is the conviction, not the commission of the offense, that renders the alien deportable. Respondent has relied heavily on *Matter of Lozada*. Not only has *Matter of Lozada* departed from the clear language of INA § 244(a)(2), it also departed from the intended construction of the statute, which was to enable the Attorney General to ameliorate hardship and injustice. *Wadman v. Immigration and Naturalization Service*, 329 F.2d 812 (9th Cir. 1964). The end result has been an expansion of the

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[5] The Ninth Circuit long ago noted the possible conflict in interpreting INA § 244(a)(2) in *Fong v. Immigration and Naturalization Service*:

> "In this section authorizing suspension of deportation of an alien who has been physically present in the United States for a continuous period of not less than ten years . . . at the very least the manner in which this section is worded left it open to two possible constructions making applicable principles that although penal in character, the deportation provisions, as a practical matter, may inflict the equivalent of banishment or exile, and *should be strictly construed.*"

308 F.2d 191 (9th Cir. 1962) (emphasis added).

requirements for suspension of deportation. This interpretation is contrary to the remedial spirit of relief intended by Congress. Another unjust consequence of calculating the ten-year period from the date of conviction is that the time between the commission of the deportable crime and the conviction of the crime can vary significantly depending on when the alien is charged. Thus, the application of § 244(a)(2) relief turns entirely on the pace at which the criminal judicial process proceeds for the alien. This period, in turn, is often lengthened by the appropriate statute of limitations. This exact result has occurred in the Petitioner's case, where the Petitioner was not convicted for the crime until three years after the misrepresentations for which he was convicted under 18 U.S.C. § 1546 were made. During those three years, the Petitioner compiled an impressive and extensive record of employment, community service, and property ownership. Petitioner has had no additional criminal offenses. These factors make the Petitoner an excellent, if not an exceptional, candidate for the discretionary relief of suspension of deportation under INA § 244(a)(2). Instead, the BIA refused to address the equities of the Petitioner's case, deeming him statutorily ineligible for suspension of deportation.

Recently, the BIA held that an alien who is deportable under INA § 241(a)(2)(A)(ii), as an alien convicted of two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, is statutorily ineligible for suspension of deportation under INA § 244(a)(2), and for voluntary departure under INA § 244(e), *because he is precluded from establishing the requisite good moral character for the respective 10-year and 5-year*

periods, due to his commission in 1992 of the acts underlying his convictions. In re D-, I&N Interim Dec. No. 3223 (BIA 1994) (emphasis added).

In *In re Bufalino*, 11 I&N Dec. 351 (BIA 1965), *motion den.* (BIA) 12 I&N Dec. 277, the BIA decided the ten-year period of physical presence required to establish statutory eligibility for suspension of deportation under § 244(a)(2) "runs from the date of the last deportable act." *See also In re M-*, 5 I&N Dec. 261 (BIA 1953). In *In re M-*, a suspension case, the BIA rejected the INS argument that the statutory interpretation of the beginning of the ten-year period relied on the date of conviction. *Id.* at 265. The BIA carefully considered the wording of the instant statute, concluding that "while it may be argued that Congress was endeavoring to place certain added restrictions on the granting of suspension to persons of the criminal class, we do not think such an argument would be tenable." *Id.* at 267.

The Petitioner submits that a careful examination of the language of INA § 244(a)(2) will result in a finding by the Court that *Matter of Lozada* was decided incorrectly by the BIA. Further, the Petitoner respectfully suggests that the instant case, and by implication the BIA's decision in *Matter of Lozada*, was decided against the clear weight of the numerous decisions recognizing that the applicable ten-year period begins with the commission of the deportation-worthy crime.

CONCLUSION

For the reasons set forth hereinabove, a Writ of Certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

LAWRENCE B. FABACHER, II
GILL & FABACHER
833 Baronne Street
New Orleans, LA 70113
(504) 522-2800

Attorney of Record for
Petitioner Tarek Elagamy

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60138
Conference Calendar

TAREK ELAGAMY,

Petitioner,

versus

IMMIGRATION AND
NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
A-26 440 666

(Filed Aug. 22, 1995)

Before KING, JOLLY, and WIENER, Circuit Judges.

PER CURIAM:*

Tarek Elagamy petitions for review of the Board of Immigration Appeals' (BIA) denial of his motion requesting that he be allowed to reopen his case in order to move

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

for a suspension of deportation pursuant to 8 U.S.C. § 1254(a)(2). To succeed in a motion to reopen, the alien must establish prima facie eligibility for the relief sought. *See I.N.S. v. Doherty*, 502 U.S. 314, 323 (1992). Even if the alien has made out a prima facie case for relief, the BIA has the discretion to deny a motion to reopen. *Id.* This court reviews the BIA's denial of a motion to reopen for abuse of discretion. *Id.*

Elagamy contends that had the BIA granted his motion to reopen, he would have established that his deportation should have been suspended pursuant to § 1254(a)(2). Sections 1254(a)(2) states that the Attorney General may suspend deportation in the case of an alien who, among other requirements, "has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act . . . constituting a ground for deportation. . . . "

Elagamy argues that he "committed" his deportation-worthy violation in 1983, when he lied to immigration officials about whether he resided with his wife, rather than in 1986 when he was convicted of the offense. In *Brown v. I.N.S*, however, this court dismissed the petitioner's request for suspension of deportation pursuant to § 1254(a)(2) because he had not been in the United States for ten years since the date of his *conviction* of a deportation-worthy crime. 856 F.2d 728, 731 (5th Cir. 1988). "[I]t is the firm rule of this circuit that one panel may not overrule the decisions of another." *United States v. Taylor*, 933 F.2d 307, 313 (5th Cir.), *cert. denied*, 502 U.S. 883 (1991). Accordingly, Elagamy's petition for review is without arguable merit and is thus frivolous. *See Howard*

v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). Because this petition is frivolous, it is DISMISSED. *See* 5th Cir. R. 42.2.

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Va 22041

File: A26 440 666 – New Orleans Date: Feb. 9, 1995

In re: TAREK ELAGAMY

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Lawrence B. Fabacher II, Esquire
Gill & Fabacher
833 Baronne Street
New Orleans, Louisiana 70113

ON BEHALF OF SERVICE:
Agnelis L. Reese
General Attorney

CHARGE:

Order: Sec. 241 (a)(5), I&N Act [8 U.S.C. § 1251(A)(5)] –

APPLICATION: Reopening

The respondent filed a motion requesting the Board to reopen his deportation hearing in order to apply for suspension of deportation pursuant to section 244(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(2). The motion to reopen will be denied.

In support of his motion to reopen, the respondent submitted an Application for Suspension of Deportation (Form I-256A), a letter dated February 25, 1993, from the

City of Lafayette Police Department, a copy of his marriage certificate, three affidavits from individuals attesting to his good moral character, and twenty-seven letters from business associates attesting to his good moral character. The respondent also submitted, *inter alia*, good moral character. The respondent also submitted, *inter alia*, an estimate of his business investments in the United States and a copy of his certificate of trade name (Quality Oil Change & Tune-Up).

A motion to reopen must, among other things, state new facts to be considered at the reopened hearing and must be supported by previously unavailable, material evidence. *See* 8 C.F.R. §§ 3.2, 3.8(a), 242.22. The alien also must establish prime facie eligibility for the relief sought before a motion to reopen will be granted. *INS v. Doherty*, ___ U.S. ___, 112 S.Ct. 719 (1992); *INS v. Abudu*, 485 U.S. 94 (1988); *Matter of Ruiz*, Interim Decision 3116 (BIA 1989). The Board has discretion to deny a motion to reopen even if the alien has made out a prime facie case for relief. *INS v. Doherty, supra.* Moreover, a party who seeks to reopen proceedings bears a "heavy burden" of proving that if the proceedings before the immigration judge were reopened, the new evidence would likely change the result in the case. *See Matter of Coelho*, Interim Decision 3172 (BIA 1992); *see also INS v. Doherty, supra; INS v. Abudu, supra.*

The record reflects that the respondent was convicted on September 10, 1986, under 18 U.S.C. § 1546 (Exh. 5). On April 20, 1988, an immigration judge found the respondent deportable as charged under section 241(a)(5)

of the Act, 8 U.S.C. § 1251(a)(5).[1] As a result of the respondent's criminal offense he is ineligible for suspension of deportation unless he qualifies under section 244(a)(2) of the Act. In order to demonstrate statutory eligibility for suspension of deportation under section 244(a)(2) of the Act, the respondent must establish that he:

> has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act . . . constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the option of the Attorney General, result in exceptional and extremely unusual hardship to the alien. . . .

We have held that the 10-year period is measured from the date of the conviction. *See Matter of Lozada.* 19 I&N Dec. 637, 640 (BIA 1988); *Matter of P-*, 6 I&N Dec. 788 (BIA 1955); *see also Brown v. INS*, 856 F.2d 728, 731 (5th Cir. 1988). However, in a supplemental brief in support of the motion to reopen, counsel for the respondent argues that our holding in *Lozada, supra,* is incorrect and leads to a harsh result. Counsel's argument that the 10-year period should be measured from the commission of the offense instead of the date of the conviction is unpersuasive. Although the commission of the act may have

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[1] This provision has been revised and redesignated as section 241(a)(3)(B)(iii) by section 602(a) of the Immigration Act of 1990, 104 Stat. at 5080.

occurred in 1983, it did not become "a ground for deportation" until the respondent was convicted of that act on September 10, 1986. *See* section 241(a)(5) of the act on September 10, 1986. *See* section 241(a)(5) of the Act. Therefore, 10 years from the date of the conviction constituting the ground of deportation have not yet elapsed.

Accordingly, although we note the many positive character references included in the respondent's motion, the respondent is unable to demonstrate statutory eligibility for reopening. Therefore, it would serve no purpose to reopen this record to permit him to apply for suspension of deportation.

Accordingly, based on the foregoing, the motion to reopen will be denied.

ORDER: The motion to reopen is denied.

/s/ Mary Maguire Dunne
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
New Orleans, Louisiana

File No.: A 26 440 666)
)
In the Matter of:)
)
TAREK ELAGAMY)
)
Respondent)

April 20, 1988

IN DEPORTATION PROCEEDINGS

CHARGE:

Section 241(a)(5) of the Immigration and Nationality Act in which you have been convicted under Section 1546 of Title 18 of the United States Code.

APPLICATION:

Political asylum; Withholding of deportation, pursuant to 243(h) and 208 of the immigration and Nationality Act.

ON BEHALF OF RESPONDENT:

David A. Kattan, Esquire
Tom Adams, Esquire
419 Gravier Street
New Orleans, Louisiana 70113

ON BEHALF OF SERVICE:

Clarisssa Muller, Esquire
INS/Trial Attorney
New Orleans, Louisiana

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 39 year old married male native and citizen of Egypt, pursuant to Order to Show Cause. Respondent is alleged to have entered the United States

at New York, New York, on or about the 15th of May, 1982. The respondent was convicted in the United States District Court, Eastern District of Louisiana for Section 1546 of Title 18 of the United States Code. The respondent admitted some of the allegations in the Order to Show Cause, however, contested the matter of conviction and the charge. Deportability was established which is clear, convincing and unequivocal. The respondent designated the Honduras as the country of deportation and asked for the relief in the form of political asylum, withholding of deportation and adjustment of status. In view of the fact that the respondent does not have an approved I-130 the adjustment of status is no longer before this Court. It is noted for the record that this proceeding, this matter of this record, was destroyed in a fire that took place in the Oakdale Alien Detention Facility in the latter part of November, 1987, when the fire consumed the entire facility to include the Court building. All the records of the Court were destroyed and this is one of the records that was destroyed. The proceeding was started anew. The Order to Show Cause is a copy as are some other documents in the record. The applicant filed the application for relief, 589, and supporting documents were forwarded to the State Department for an advisory opinion. That advisory opinion will be found in Exhibit 4. Exhibit 5 in this case is the conviction record, number 6 is the indictment. The hearing on the merits of the relief application took place on the 20th day of April, 1988 in New Orleans, Louisiana. At that hearing the respondent testified that he was born in Cairo, Egypt and that he received his Bachelor of Science degree in accounting at Ain Shams University in Egypt with a B.S. in accounting. The

respondent came to the United States to seek a Masters Degree in business in accounting, however, the respondent did not complete his education for higher learning in the United States.

The respondent subsequently married, divorced, and is now married to his current wife. The respondent's wife is a Christian, she has two children by a previous marriage and respondent testified that if he returns to Egypt with his Christian wife she will have a hard time in Cairo. He points out that Egyptians don't like Christians as they are members of the Moslem faith and if he goes back he will be rejected by his family and his family has informed him that he will not be able to live in the house. The housing situation in Cairo is critical and in Egypt is critical and therefore the respondent will have difficulty in finding a home, won't be able to live at his house, he can't afford housing and he will incur some discrimination. The respondent's wife is a non-believer or some would call an infidel. There are some Moslem fanatics who are against U.S. people and also against people of the Moslem faith marrying Christians. The respondent, himself, is a self proclaimed Moslem fanatic and he says as a result of the fact that he is and he has married a Christian, this would put him in some difficulties. He states that he would face persecution and most certainly discrimination should be return home. Probably from the government. He states that his step-children may stay in the United States because their father does not like him being a Moslem and would probably not allow them to go to Egypt and if they did they would not be discriminated in school, however, they would find it difficult. He also states that there are four reigning groups in his

country that don't like Americans and also states the fact that President Sadat was assassinated and probably because of his ties with America. The respondent has evidently been told by his parents that he can't live in his home with his Christian wife.

However, to establish eligibility for withholding of deportation pursuant to Section 243(h) of the Act. An alien must show clear probability of persecution in the country designated for deportation on account of race, religion, nationality, membership in a particular social group or political opinion. An alien must show that it is more likely than not that he would be subject to persecution on one of the grounds specified.

An application for asylum under Section 208 must meet the definition of a refugee which requires him to show persecution or a well-founded fear of persecution in a particular country on account of race, religion, nationality, membership in a particular social group or political opinion. The statutory standard requires the alien to show that he possesses a well-founded fear of persecution by establishing a reasonable person in circumstances would fear persecution if he were to be returned to his native country. A reasonable person may well fear persecution even where it is likely significant and clearly probable. It is noted that the well-founded fear standared [sic] requires a lesser degree of proof than the clear probability standard. In this particular case, the respondent bases his application upon the fact that he is a Moslem, the fact that he is now married to a Christian and as a result of this that people will discriminate and persecute him based on this marriage.

However, the respondent does bear the burden of proof in both the asylum and withholding applications to establish by evidence that he has a well-founded fear of persecution or that his life or freedom would be threatened on any of the five grounds of persecution previously enumerated in 8 C.F.R. 208.5. Now is this particular case the respondent has not stated that he has ever been persecuted or that any acts of persecution have been directed against him to date. It appears that respondent's fears and concerns right now are speculative in nature. The respondent has stated that his family would possibly turn him out and that he would face discrimination as a result of his marriage to his wife and possibly persecution. There are fanatic groups also there.

Now a showing of a well-founded fear of persecution usually requires the alien to present some objective evidence which establishes a realistic likelihood of persecution. The aliens own subjective speculations and conclusional statements unsupported by independent corroborative evidence usually will not suffice. However, if the alien's testimony is believable, consistent, sufficiently detailed to provide a plausible and coherent account of the basis for this fear this will be sufficient. In this case, the respondent's story is less than coherent, and sufficiently detailed to provide a plausible basis for that fear. The respondent states that he is married to a Christian, however, as he testifies it seems that there would be little difference in his case to think that he would face anymore discrimination then that faced by those in American [sic] who may bring home a Korean wife or a Jewish individual who marries a Christian or Christian marries a Jew or Protestant who married a Catholic or a Catholic

who marries a Protestant or vice versa. Any time a individual marries another individual of a different culture as well as that of a different religion may certainly face some discrimination or different way of life. It would be difficult for anyone when they have two different cultures and two different faiths to make a successful marriage. However, the respondent states that his family would not accept him because of his Christian wife. That is not unusual for any family in America that the respondent would be returned home with the wife and child, the parents would turn him out. I know that usually an individual, when he gets married, is expected to live on his own and certainly not move in with the family. So I can't see that the respondent in this particular case would be any different from any other individual of the world where he would have to be expected to support his own wife and family.

The respondent testified that he may be possibly subjected to persecution and discrimination but he is not specific and talks about probability and possibilities. As I stated earlier, the burden of proof is upon the respondent to show that he faces a clear probability of persecution in his country, which in this case is Egypt, on account of race which is not a factor, nationality and certain not membership in a particular social group, political opinion appears to be only be because his wife is a member of the Christian faith. Certainly the Court would conclude that no reasonable person in the respondent's shoes would fear persecution if he were to go to Egypt with a Christian family. He may face the same luck as anyone who brings home a foreign born wife whether it be in World

War II, Korea or Viet Nam. However, this certainly would not be persecution.

The Court just cannot conceive how the respondent's assertions in Court could ever meet the standards of persecution set forth in 208 and 243(h). It appears that the respondent's case is woefully inadequate and therefore does not meet the standards set forth by 208 and 243(h).

Again, it is noted from the Country Rights Reports On Human Practices, 1987, that the Constitution of Egypt states it is an Islamic state which provides for freedom of religious expression and equality before the law regardless of religion. Egypt has a tradition of religious toleration and the authorities generally uphold the rights of religious minorities. Even Egyptian Jews who immigrated there years ago appear to be able to practice their faith without restrictions or harrassments. Synagogues and churches are routinely provided police protection. Various Protestant sects operate with significant Egyptian membership, while it does have smaller followers. Accordingly, it certainly appears that the respondent's fears would be speculative and without basis. Therefore, I find that the respondent is certainly not eligible for withholding and asylum. The respondent, because of his conviction, would not be eligible for voluntary departure and because of the fact that respondent does not have an approved I-130 is certainly ineligible at this time for adjustment of status.

Therefore, it is ORDERED that the request for political asylum, withholding of deportation pursuant to Section 208, 243(h) be denied and that the respondent be

deported from the United States to Egypt on the charge contained in the Order to Show Cause.

/s/ R. Kevin McHugh
R. KEVIN McHUGH
Immigration Judge

Supreme Court, U.S.
FILED
DEC 11 1995
OFFICE OF THE CLERK

No. 95-584

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1995

TAREK ELAGAMY, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

THOMAS W. HUSSEY
ALISON R. DRUCKER
VERNON BENÉT MILES
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether petitioner has been "physically present in the United States for a continuous period of not less than ten years" since the grounds for his deportation arose, as required for eligibility for suspension of deportation under 8 U.S.C. 1254(a)(2).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unpublished, but the decision is noted at 68 F.3d 465 (Table). The decision of the Board of Immigration Appeals (Pet. App. 4-7) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1995. The petition for a writ of certiorari was filed on October 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a citizen and native of Egypt who entered the United States as a non-immigrant student in May 1982. In September 1983, after his marriage to a United States citizen, petitioner's immigration status was adjusted to that of lawful permanent resident. Pet. 4-5, Pet. App. 8-9.

In September 1986, petitioner was convicted in the United States District Court for the Eastern District of Louisiana of having made a materially false statement in his application for permanent resident status, in violation of 18 U.S.C. 1546. Petitioner was sentenced to five years' imprisonment, but the court suspended the sentence in favor of a five-year period of probation. Pet. 5.

2. Three months later, the Immigration and Naturalization Service (INS) issued an order to show cause why petitioner should not be deported pursuant to Section 241(a)(5) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(5) (1982).[1] See Pet. App. 5-6; Pet. 5-6. Section 241(a)(5) provides that an alien "shall, upon the order of the Attorney General, be deported" if he "has been convicted under section 1546 of title 18." At a hearing held on April 20, 1988, petitioner was found deportable and his applications for political asylum and withholding of deportation were denied. Pet. App. 11-14. That decision was upheld by the Board of Immigration Appeals on June 24, 1992, and by the United States Court of Appeals for the Fifth Circuit. Pet. 6; see also *Elagamy* v. *INS*, 990 F.2d 626 (1993) (Table).

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[1] This provision was renumbered by the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, § 602, 104 Stat. 5077-5082, and now appears as 8 U.S.C. 1251(a)(3)(B)(iii).

3. In August 1993, petitioner filed with the Board a motion to reopen his deportation proceedings in order to apply for suspension of deportation under Section 244(a)(2) of the INA, 8 U.S.C. 1254(a)(2). Pet. 6. Section 244(a)(2) requires, *inter alia*, that the applicant have been "physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation." Petitioner contended that he had satisfied the physical presence requirement, because ten years had passed since he committed the offense that ultimately resulted in his criminal conviction. Pet. App. 6. Relying on *In re Lozada*, 19 I. & N. Dec. 637, 640 (BIA 1988), the Board concluded, however, that "the 10-year period is measured from the date of the conviction." Pet. App. 6. The Board explained that "[a]lthough the commission of the act may have occurred in 1983, it did not become 'a ground for deportation' until [petitioner] was convicted of that act on September 10, 1986." *Id.* at 6-7. Because petitioner failed to satisfy the "physical presence" requirement, the Board denied petitioner's motion to reopen. *Id.* at 7.

4. The court of appeals denied a petition for review, finding petitioner's appeal "without arguable merit and * * * frivolous." Pet. App. 2. The court explained that in *Brown* v. *INS*, 856 F.2d 728 (5th Cir. 1988), it had decided the same issue, finding that the alien was ineligible "for suspension of deportation pursuant to § 1254(a)(2) because he had not been in the United States for ten years since the date of his *conviction* of a deportation-worthy crime." Pet. App. 2.

ARGUMENT

Petitioner renews his claim that the ten-year period of physical presence required by Section 244(a)(2) should commence to run when the alien commits a deportation-worthy criminal offense, rather than from the date of his conviction for that offense. The court of appeals correctly rejected that claim, and its decision does not conflict with the decision of any other court of appeals.

1. Section 244(a)(2) provides that the ten-year period commences to run "immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation." 8 U.S.C. 1254(a)(2). Petitioner was ordered deported under Section 241(a)(5), which provides that an alien must be deported if he "has been convicted under section 1546 of title 18." 8 U.S.C. 1251(a)(5) (1982). Under the plain terms of those provisions of the INA, the "ground" for ordering petitioner's deportation arose when he was "convicted under" 18 U.S.C. 1546. As the Board correctly explained, "[a]lthough [petitioner's offense] may have occurred in 1983, it did not become a 'ground for deportation' until he was convicted * * * on September 10, 1986." Pet. App. 6-7. It is from that date, therefore, that the ten-year period must run in petitioner's case.

Petitioner offers no reason to depart from that textual analysis, but instead relies heavily on his own conception of the policies that underlie Section 244(a)(2). See Pet. 9-11. Petitioner's interpretation leads to irrational results, because, under his view, a criminal alien who evaded arrest for ten years would become eligible for suspension under Section 244(a)(2) sooner than one who turned himself in, confessed, and

pleaded guilty. And, even if petitioner's interpretation were plausible, "it would be too much to say that the statute 'cannot bear the interpretation adopted by' the" Board. *Reno* v. *Koray*, 115 S. Ct. 2021, 2027 (1995) (quoting *Sullivan* v. *Everhart*, 494 U.S. 83, 91-92 (1990)). Because the Board's view represents a "permissible construction of the statute," *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), it is entitled to deference.[2]

2. There is no merit to petitioner's claim that the decision below conflicts with decisions of other courts of appeals. The issue of how to calculate the ten-year

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[2] Petitioner also suggests that the Board's position has changed over time. The cases on which petitioner relies, however, do not support his claim. In *In re M*, 5 I. & N. Dec. 261 (BIA 1953), the issue before the Board was how to reconcile apparently conflicting statutory directions that, on the one hand, required a showing of good moral character, and, on the other, barred a finding of good moral character if an alien had been incarcerated. The Board made clear, however, that "it was not the commission of the offense, but the conviction, which constitutes a ground for deportation," *id.* at 265—the same principle articulated in *In re Lozada*, *supra*. The Board's decision in *In re Bufalino*, 11 I. & N. Dec. 351 (BIA 1965), is similarly inapposite. In that case, the provision of the INA setting forth the ground of deportation identified acts, not convictions. The alien had committed two acts, each of which rendered him deportable; the issue simply was whether the ten-year period began to run from the first or from the second act. *Id.* at 357-358. In any event, even if the Board had changed its position over the years, it was not estopped from doing so. See *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2161 (1993). Any change in the agency's position "might reduce, but would not eliminate," the deference owed to its interpretation. *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 817 (1995).

physical presence requirement was simply not presented in most of the cases cited by petitioner. See *Cortes-Castillo* v. *INS*, 997 F.2d 1199, 1203 n.2 (7th Cir. 1993) ("parties do not dispute that Cortes has met" the physical presence requirement); *Reid* v. *INS*, 756 F.2d 7, 8 n.5 (3d Cir. 1985) ("Reid has not asked us to review his claim for relief from deportation under section 244(a)(2) of the Act"); *United States ex rel. Marcello* v. *District Dir., INS*, 634 F.2d 964, 978 (5th Cir.) ("It is undisputed that the respondent has met the ten-year continuous physical presence requirement"), cert. denied, 452 U.S. 917 (1981); *Rassano* v. *INS*, 492 F.2d 220, 223 (7th Cir. 1974) ("The Service concedes that petitioner has met the ten-year continuous residence [*sic*] requirement"). Similarly, in *Leon-Hernandez* v. *INS*, 926 F.2d 902, 906 (9th Cir. 1991), while the court noted that the "last of the crimes for which Leon-Hernandez was convicted was committed on October 21, 1981, less than ten years ago," the alien was ineligible for relief irrespective of whether the ten-year period was computed from the conviction or from the commission of the offense. The same was true in *Rodriguez* v. *INS*, 9 F.3d 408, 414 (5th Cir. 1993).

In the remaining two cases relied upon by petitioner, the discussion of the "physical presence" requirement also was *dicta*. In *Borokinni* v. *INS*, 974 F.2d 442, 445 n.1 (4th Cir. 1992), the court merely noted in passing that the alien would not be "eligible to seek suspension of deportation until May 1993, ten years after he committed his heroin offenses." And *United States* v. *Santelises*, 509 F.2d 703 (2d Cir. 1975), actually involved an alien's claim that he would not have pleaded guilty to a criminal charge if he had understood that the conviction could be used as a

ground for his deportation. After rejecting that claim on the merits, *id.* at 704, the court went on to suggest that the alien's circumstances (as portrayed by his counsel) were sufficiently sympathetic that the INS would not "be remiss in its duty if it were to wait the few months necessary" for the alien to attain eligibility under Section 244. It was in that context that the court noted, in a footnote, that the alien "may already be eligible" because more than ten years had elapsed since the crimes were committed. *Id.* at 704 n.2. That off-hand reference on an issue that was not presented is insufficient to place the Second Circuit in conflict with the decision of the court of appeals in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

THOMAS W. HUSSEY
ALISON R. DRUCKER
VERNON BENÉT MILES
Attorneys

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